NO. 22275

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER E. CRAVEN, Warden,)
Folsom State Prison, et al.,)
)
Appellant,)
)
vs.)
)
BILLY NORMAN GRIMM,)
)
Appellee.)
)

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APPELLANT'S OPENING BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellee's petition for writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

On March 14, 1962 appellee, Billy Norman Grimm, was convicted of first degree burglary in Los Angeles County, and subsequently sentenced to state prison for the term prescribed by law. He filed a timely notice of appeal. On July 27, 1962

Grimm withdrew his appeal, thereby revesting the sentencing court with jurisdiction. On the motion of both the prosecutor and the public defender, the judgment sentencing Grimm to state prison was vacated. Grimm was then sentenced to state prison for the term prescribed by law, but the execution of the sentence was suspended and Grimm was placed on ten years probation and required to serve one year in the county jail. After an escape by Grimm from the county jail, his probation was revoked, the suspension of the prison sentence was lifted, and he was committed to state prison for the term prescribed by law for first degree burglary. He did not appeal from the July 27, 1962 judgment which sentenced him to state prison.

Grimm subsequently filed petitions for writs of habeas corpus with both the Marin County Superior Court and the California Supreme Court. Both were denied.

More detailed statements about the proceedings in the state courts are found in appellant's "Supplemental Points and Authorities in Opposition to Petition for Writ of Habeas Corpus" (RT 63-64).

B. Proceedings in the federal courts.

On January 24, 1966 appellee filed a petition for writ of habeas corpus with the United States District Court. The proceedings in the federal court are fully and fairly stated in appellee's "Supplemental Points and Authorities Supporting Petition for Writ of Habeas Corpus" (RT 87-89). This statement recounts the proceedings up to the time that the District Court ordered an evidentiary hearing.

An evidentiary hearing was held on March 10, 1967. Appellee was the sole witness at the evidentiary hearing. Various documents were introduced into evidence. Counsel stipulated as to certain testimony that would have been given by witnesses not present (RT 115-16). At the close of the evidentiary hearing the District Court requested further Points and Authorities by both counsel on questions which had arisen during the course of the hearing. Counsel for appellee (RT 117) and counsel for appellant (RT 147) thereupon filed the requested Points and Authorities.

On August 4, 1967 the District Court entered its order granting the petition for writ of habeas corpus (RT 157-69). Appellant thereupon petitioned the District Court for a certificate of probable cause to appeal the order entered on August 4, 1967 by the District Court (RT 170-72). On August 24, 1967 the District Court granted the certificate of probable cause (RT 173). Upon motion of appellant (RT 174-75), the District Court stayed the execution of the August 4, 1967 order pending the proceedings on appeal before this Court (RT 176).

STATEMENT OF FACTS

The relevant facts concerning the issues raised before the District Court and now raised before this Court are fully and fairly stated in the August 4, 1967 order of the District Court (RT 158-62).

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[illegible]

[illegible]

[illegible]

SUMMARY OF APPELLANT'S ARGUMENT

The District Court, finding that the search of appellee's vehicle was illegal, erred in three respects: (1) appellee intelligently and voluntarily consented to the search of the vehicle, (2) the search of the glove compartment was a proper precautionary measure by the police even if they lacked probable cause for arrest at that stage, and (3) the police had probable cause for appellee's arrest and the search of his vehicle was incidental to that arrest.

ARGUMENT

THE SEARCH OF APPELLEE'S VEHICLE WAS REASONABLE.

When the United States Supreme Court extended to states the exclusionary rule for illegal searches and seizures, the rationale advanced was that the rule would deter lawless and unconscionable invasions of privacy by the police.[1] To apply the Mapp rule to this case, a case in which the police actions were virtually compelled by their duty to protect the community, is to lose sight of this rationale. The application of the exclusionary rule to circumstances like the instant

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[1] In Mapp v. Ohio, 367 U.S. 643 (1961), the Court stated:

> "[T]he purpose of the exclusionary rule 'is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.'" Id. at 656.
>
> "Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold." Id. at 657.

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ones not only turns an obviously guilty criminal free but also lacks the saving grace noted in Mapp of discouraging the state from a "failure to observe its own laws, or worse, its disregard of the charter of its own existence." Id. at 659.

The Order of the District Court accurately and fairly recounts the facts surrounding the search and seizure in this case. The police saw appellee discharge a man from his station wagon at 3:30 a.m.; the discharged passenger began walking west on Washington Boulevard and the station wagon drove away east on Washington. When the police made a U-turn and approached the man on foot, he ran from them and disappeared around a building. The police searched but were unable to find him. Five minutes after the appellee's station wagon had discharged the fleeing man, the officers saw the vehicle re-enter the area - this time driving west on Washington Boulevard. They stopped the station wagon, and appellee got out and began walking back to the police vehicle. While one officer checked appellee's identification, the other shined a flashlight inside the station wagon and saw a brown cloth bag, a pry-bar, and a flashlight.

The officers then asked Grimm if they could search his vehicle and he replied, "Yes, go right ahead." Opening the door, one of the officers saw two pairs of gloves under the driver's seat. When he tried the glove compartment, he found it locked and asked Grimm for the key. Although Grimm replied he did not have a key, the officer saw one in the open ash tray on the dashboard, used it to open the glove compartment,

and discovered two loaded handguns inside. Grimm was then notified he was under arrest, and the officers embarked on a complete search of the vehicle and found the loot from the burglary for which Grimm was later convicted.

A. The consent to the search was voluntary and intelligent.

The Order of the District Court is uncertain on the issue of appellee's consent. It appears that the District Court found that appellee gave a "limited consent," which was terminated when he told them that he did not have a key to the glove compartment (RT 163-64). The reason for this "termination" is that the appellee was knowledgeable in the law of search and seizure and that he knew the guns were in the car. The reasons advanced by the District Court are not persuasive. Appellee's knowledge of the law of search and seizure, as well as his previous encounters with police, is evidence that petitioner could give an informed and voluntary consent.[2] Further, appellee's knowledge that the guns were in the glove compartment does not necessarily undermine this consent, for a criminal may make an intelligent and calculated consent to a search in the hope that the search will turn up nothing and

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[2] As the transcript of the Evidentiary Hearing discloses, appellee had just "beaten" a case on the basis of search and seizure law and this prior proceeding was fresh in his mind when he was stopped by the arresting officers (ERT 38-41).* In this regard, the District Court noted that appellee was an intelligent man (ERT 75).

* "ERT" designates the transcript of the Evidentiary Hearing of March 10, 1967.

divert suspicion from him. In the instant case, the appellee was unaware of what the police knew about the burglary he had already committed and may well have attempted to divert police suspicion by agreeing to the search. That the police search was more intensive then he had hoped does not vitiate the voluntary nature of his consent. The Order of the District Court, in effect, would allow a suspect who knows he has contraband in his possession to consent to a search with absolute impunity. If the search turns up nothing, his strategem in diverting suspicion suceeds. If the search turns up the contraband, then he courts will throw out the consent on the basis that the suspect knew the contraband was there.

It should be noted that there is nothing in the findings and conclusions of the District Court which even intimates that the police acted unreasonably in accepting appellee's consent. It seems bizarre that the exclusionary rule, the announced purpose of which is to deter lawless and unreasonable police action, is applied in this case in which the police acted reasonably in relying on the apparently free consent of the appellee. The District Court would exclude this evidence on the basis of supposed subjective knowledge on the part of appellee, knowledge which by its nature could not be known to the police.

We submit that appellee's consent under the circumstances was an effective one. In Schoepflin v. United States, 391 F.2d 390, 398 (9th Cir. 1968) this Court set forth this as a test for the effectiveness of a consent:

> ". . . [whether] the words used by Smith [the defendant] reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) Smith knew may be freely and effectively withheld."

This Court remanded the case for a hearing on this question after observing:

> "Nor did Smith himself say or do anything to indicate that he knew he had the right to withhold consent. While Smith had been convicted of prior robberies, there is no showing that they involved search and seizure questions which would have served to educate Smith as to his constitutional right to withhold consent." Id. at 399.

There can be no doubt that appellee was fully conversant with the law of search and seizure, and aware of his rights when the police stopped him. Further, the District Court found him to be an intelligent man. The District Court would throw out appellee's consent, not on the basis that he was unintelligent or ill informed, but because he had a secret reservation or hope that the search would not turn up the contraband. We submit that this is not the proper standard.

B. The search of the glove compartment was a reasonable precaution for the safety of the officers and persons in the area.

The Order of the District Court acknowledges that the arresting officers were justified in detaining appellee

because of the suspicious activities by him and his cohort (RT 165-66). As the United States Supreme Court held in Terry v. Ohio, 392 U.S. 1 (1968), 20 L Ed 2d 889, when the police stop a person for suspicious circumstances not amounting to probable cause for arrest, a precautionary search of that person may be justified. The test for the permissible limits of the search is:

> ". . . whether it was reasonably related in scope to the circumstances which justified the inference in the first place." Id. at 905.

Elaborating on this test, the Court stated:

> "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he had probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 909.

In the case of a pedestrian on the streets, it may be sufficient, as it was in Terry, to "pat-search" the exterior clothing to discover guns, knives, clubs, or kindred weapons. Obviously, a different type of search is appropriate when the suspect is a motorist. In the latter case, reasonable prudence

dictates that the police also make a cursory search of the areas of the vehicle to which the driver has easy access, e.g., the front seat and the area below it, the glove compartment, and the area under the dashboard.

Applying the Terry test to the instant case, one must agree that reasonably prudent men in the position of the arresting officers would have concluded that a search of the glove compartment for weapons was essential for their own protection and that of others in the area. They had ample reason for suspecting that appellee was engaged in an early morning burglary, they saw burglar tools on his floor board, and they were aware of the strong possibility that appellee's confedderate was still lurking in the area.

To the possible objection that the glove compartment was locked, the obvious answer is that glove compartments may be opened in a matter of seconds, especially when, as in the present case, the key to the compartment is readily available in the dashboard ash tray. Indeed, the ready availability of the key and the loaded handguns in the glove compartment suggest that appellee may have been prepared for a "shoot-out" with police when his arrest seemed imminent. Seeing the loaded guns in the glove compartment, the officers clearly had probable cause for appellee's arrest. Wilson v. Porter, 361 F.2d 412, 416 (9th Cir. 1966).

C. The police had probable cause for appellee's arrest before the glove compartment was searched.

Although the police had interrupted appellee and his

fleet-footed companion in the midst of what could well be an early morning burglary,[3] the Order holds that they could not legally search the appellee's vehicle for further burglar's tools, loot, or evidence which would lead to the identity or whereabouts of the fleeing man. This prohibition on police conduct flies in the face of common sense: the only alternative left to the police is to continue on their rounds and try to dismiss any concerns they might have about the safety of persons and property in the area.[4]

In reaching the conclusion that the facts described above did not give the officers probable cause to search appellee's vehicle, the District Court relied heavily on the California case of <u>People</u> v. <u>Mickelson</u>, 59 Cal.2d 448, 380 P.2d 658 (1963). As the discussion in the Order reveals, <u>Mickelson</u> was a case involving a known, completed robbery. Holding that the facts known to the officers did not amount to probable cause justifying a search of the vehicle, the California Supreme Court noted that the police could have taken the suspects to the crime scene a few blocks away for identification.

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[3] Surely this inference is reasonable in the light of the hour, the passenger's flight, appellee's return to the area, and appellee's having within easy reach three common instruments of the burglary trade: a cloth sack, a pry-bar, gloves, and a flashlight. Perhaps the word "interrupted" in this context is inaccurate, since for all the officers knew appellee's companion could have engaged in a burglary at the time they stopped appellee.

[4] Unlike situations in which believed criminal activity is taking place at or emanating from a fixed locus, the circumstances obviously precluded obtaining a search warrant or arranging for a "stake-out" or close surveillance.

People v. Mickelson, supra, at 454. No such alternative was available to the police in the instant case.

Recent California and federal cases, which more closely approximate the facts of the instant case, would permit a search.

The facts in the recent case of People v. Ruiz, 265 A.C.A. 869 (1968), are similar to those of the instant case. In Ruiz, at 4:30 a.m. the arresting officers saw defendant and a companion apparently signalling with a flashlight. Another man approached the pair, but he reversed his direction and walked briskly away upon seeing one of the police officers. After driving in their patrol car, the officers spotted a parked car. When they pulled up behind it and turned on their spot light, they recognized the two men they had originally seen and could see a closed, large white bag in the rear of the parked vehicle. As in the instant case, the officers did not have any knowledge that a theft had been recently perpetrated. When the officers opened the door of the parked vehicle to question the occupants, they saw some change and currency in a white bag which may have been a money bag. The occupants were placed under arrest and a search of their car revealed further loot and burglar's tools. Upholding the legality of the search, the court stated:

> "The courts desire to deter illicit police practices by prohibiting illegal searches but have not prescribed such rigid rules as to make all persons, no matter what their conduct, immune from police

> investigation. Here . . . [the arresting officers] had urgent reasons for detaining appellant, and there were exception circumstances justifying the search. The officers believed the station wagon contained articles which had come into the possession of . . . [the suspects] illegally and which could be disposed of unless preventive measures were taken." People v. Ruiz, supra, at 875.

Another recent California case similar in facts to the instant one is People v. Davis, 260 A.C.A. 182 (1968). In Davis, the arresting officers saw the defendant walking at 3:00 a.m. through a closed service station parking lot in an area in which there had previously been numerous burglaries. When the officers stopped the defendant to question him, they made a cursory search for weapons and discovered he was carrying a pair of pliers and a screwdriver with a broken tip. In the words of the court: "tools normally utilized in such [juke box] burglaries." Id. at 185. On the basis of these facts, the court held:

> "These facts were sufficient to give the officers reasonable cause to arrest defendant upon suspicion of the burglaries then under investigation. The further search of his pockets . . . was a proper incident of such an arrest." Id. at 185.

The federal courts have also consistently recognized that a police officer need not blind himself to suspicious activities which may indicate the persons or property are in

jeopardy. As this Court observed in Frye v. United States, 315 F.2d 491, 494 (9th Cir. 1963):

> "[T]he local policeman, in addition to having a duty to enforce the criminal laws of his jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and, provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so."

Based in part of this observation in Frye, this Court held in Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966), that:

> "[D]ue regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action."

As in Wilson, when the police perceive or learn other indications that the suspect is guilty of a crime, they may consider this further information in arriving at probable cause for the arrest and incidental search of the suspect.

We submit that the facts known to the officers gave them reasonable cause to believe appellee had either committed a felony or was engaged in the commission of one.

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CONCLUSION

For the reasons discussed above, appellant respectfully submits that the District Court erred in granting the petition for writ of habeas corpus. As discussed above, the circumstances surrounding the search of appellee's vehicle render that search wholly reasonable and proper. Accordingly, we respectfully request that the order granting the petition for writ of habeas corpus be reversed.

DATED: November 21, 1968

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